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JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 480

GULF COAST SHRIMPERS AND OYSTERMANS ASSOCIATION, LOUIS S. SIMMONS AND WALTER McVEAY,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

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INDEX

Subject Index

	Page
Petition for rehearing on denial of Certiorari	1
Basic Facts	1
Argument	2
Intervening Circumstances of Substantial and Controlling effect	5
Conclusion	7

Table of Cases Cited

DeLoach v. *Hicks*, 50 Ga. App. 239, 177 S. E. 822	4
Hamilton v. *U. S.*, 221 F. 2d 611	4
Hyde v. *United States*, 115 F. 2d 816, 821	4
Sample v. *Romine*, 2 So. 2d 257, 193 Miss. 706	3
United Brotherhood of Carpenters and Joiners of America v. *United States*, 330 U. S. 395, 67 S. Ct. 775	5
United States v. *Ogilvie Hardware Co.*, 67 S. Ct. 997, 330 U. S. 709, 91 L. Ed. 1192	3
Yearwood v. *Peabody*, 45 Ga. App. 451	3

Statutes and Authorities Cited

United States Code Annotated, Title 12, Section 592	4
Social Security Act, as amended:	
Section 210	5
Section 205 (b)	5
Section 205 (c)	5
Act of Congress of July 2, 1890, as amended, Section 1	2
M. Company, S. S. T. 387, reported in C. B. 1940-1, page 192	6

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Your petitioners, Gulf Coast Shrimpers and Oystermans Association, Louis S. Simmons and Walter McVeay, respectfully pray for a rehearing of the order of this Court dated December 3, 1956, denying their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Basic Facts

This is an action under the Sherman Anti Trust Law begun by indictment filed in the District Court for the Southern District of Mississippi, charging that petitioners, together with Leon Strong, now deceased, and other persons to the Grand Jurors unknown, engaged in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce among the several states and with foreign nations in shrimp and oysters in violation of Section 1 of the

Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act, and said combination and conspiracy consisted of a continuing agreement and concert of action among the defendants and others to the Grand Jurors unknown. In said indictment the individual defendants are defined as independent businessmen and joint adventurers, and the corporation defendant is stated to be a Mississippi Corporation, shown by its charter to be a labor union. Although the evidence, in part, for and against petitioners refers to price and sale of seafood petitioners testified and claimed they were paid for their labor on a "lay" share at so much per barrel for such lay shares represented by their share slips furnished to them by the factory dealers. The only question remaining would seem to be the legality of such arrangement by the fishermen-crewmembers with the factory dealers, whether such fishermen-crewmembers were independent businessmen and/or joint adventurers, or whether the latter were employees of the factory dealers, receiving a lay share of the catch in lieu of wages at so much per hour, day or week, so as to be exempt from the proscriptions of the Sherman Act.

Argument

Petitioners assign the following reasons for granting this petition:

The decision of the court below is so far a disregard of the principles of law generally applicable to situations involving joint adventurers as to call for the exercise of the supervisory powers of this court. To illustrate, there must be a joint proprietary interest and right of mutual control for the existence of a joint adventurer, and the joint purpose and proprietary interest and control distinguish joint adventurers from tenancy in common; and, too, there must be an agreement, expressed or implied, for sharing of profits

in a joint adventure. The question for ultimate decision, whether petitioners were joint adventurers, must be determined by applicable Mississippi law. The decision of the court below to the effect that the relationship of the petitioners to the factory dealers was that of joint adventurer, and not of employer and employee, is contrary to the decision of this Court in *United States* v. *Ogilvie Hardware Co.*, 67 S. Ct. 997, 330 U.S. 709, 91 L. Ed. 1192, where the court held that the determination of a joint adventure necessitates application of state law. The decision of the court below is also contrary to the generally accepted principles of law that whether or not there is a joint adventure is a fact question, and, for practical purposes, the test to be applied is the same as for determining the existence of a partnership.

If the determination of a joint adventure must rest on the application of state law, United States v. Ogilvie Hardware Co., supra, then, inevitably, the rule announced by the Supreme Court of Mississippi in *Sample* v. *Romine*, 8 So. 2d 257, 193 Miss. 706, adhering to the majority rule, must be applied here. In the cited case, the Mississippi Supreme Court held there must be a joint proprietary interest and right of mutual control for the existence of a joint adventure, and since the question whether or not there is a joint adventure is a fact question the court below should have reversed the case and remanded to the District Court to permit and require petitioners to have a jury trial of such question.

Bearing upon the question whether or not petitioners were independent businessmen, as charged in the indictment returned against them, we refer the court to the case of *Yearwood* v. *Peabody*, 45 Ga. App. 451, holding that "independent business," within statute providing employer is not responsible for employee's torts in exercising independ-

ent business, means business or employment separate and independent from employer's business. See also *DeLoach* v. *Hicks*, 50 Ga. App. 239, 177 S. E. 822, to the same effect.

The decision of the court below to the effect that "while portions of the testimony might have justified a clearer submission of factual issue of whether the captains and crewmembers operating the dealer-owned boats were employees of those particular dealers, we think it clear from this record that the error in this respect, if any, was harmless, for certainly the court might well have instructed the jury as a matter of law, that the substantial number of the Association's member-fishermen who owned, operated and licensed their own boats were not employees subject to control of the dealers," is contrary to and in conflict with the decision of the Fourth Circuit in *Hyde* v. *United States*, 115 F 2d, 816, 821, and cases there cited holding that an instruction, in prosecution under 12 U.S.C.A. § 592, for alleged false entry by National Bank official, excluding consideration of testimony as to defendants asking advice as to particular transaction from reputable bankers, was erroneous as excluding showing of good faith. The holding of the court below lends conjecture and surmise to what the jury might have done if it had been properly instructed as to whether or not the captains and crewmembers were employees of all or only a part of the boats involved in the trial of the cause; and it does not do justice to petitioners to speculate what the jury would have done had they been properly instructed by the trial court. And the holding of the court below is in conflict with the decision of the Fifth Circuit in *Hamilton* v. *U. S.* 221 F 2d 611, of which petitioners were not advised when they filed their original petition herein holding that defendants requested instructions on defenses available under the evidence should have been granted and the matter submitted to the jury by correct instructions, regardless of the trial courts' opinions about defendant's guilt. The

opinion of the court below would substitute the judgment of the court for what is stated the jury might have decided, and what the trial court might have instructed the jury. Since it is well settled by this court that a trial court may never instruct a jury to return a verdict of guilty against a defendant no matter how strong the evidence, *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395, 67 S. Ct. 775, the opinion of the lower court would substitute its judgment for that of both the trial court and the jury. Such action does not comport with fair play, and is so far a disregard of recognized procedure in criminal trials as to call for the exercise of the supervisory powers of this court.

Intervening Circumstances of Substantial and Controlling Effect

Since the denial of the petition on December 3, 1956, numerous proceedings have been instituted by the Federal Government to impose and collect F. I. C. A. taxes, and other moneys from persons occupying the status of the factory-dealers involved in this cause. Respondent is contending that the factory-dealers are employers and the fisher-crewmembers employees. In the case or matter of Oscar T. Chinn, Social Security Account No. 426-24-7371, the Social Security Administration has ruled that the services rendered by persons occupying the position of fisher-crewmembers constitute employment within the meaning of Section 210 of the Social Security Act, as amended, and of the applicable regulations of the Social Security Administration. In a decision made pursuant to the provisions of Section 205 (b) and (c) of the Social Security Act, as amended, the Social Security Administration ruled that the services performed by said Oscar T. Chinn for the Biloxi Canning and Packing Co. and the B. Taltavull

Shrimp and Oyster Co., Limited of Biloxi during the period January 1, 1950 through February 8, 1954, and February 29, 1954 through February 18, 1955, under the same working agreement and conditions involved in our case, constituted an employer-employee relationship between said Oscar T. Chinn and said Companies.

To the same effect is the decision in the matter of the *M. Company, S. S. T.* 387 reported in C.B. 1940-1, page 192 holding that crewmember fishermen such as the individual petitioners in our case, are subject to the F. I. C. A. tax.

There is now pending before the appellate staff in the City of Jackson, Mississippi the case of the Williams Packing and Navigation Co., involving the questions of liability for unemployment and Social Security tax to the Federal Government. And counsel for petitioners are advised that the mentioned cases are but a few of those now pending throughout the United States. While it is recognized that no principle of res judicata or estoppel operates to bar the government from maintaining this Sherman Act prosecution "merely because one of its welfare agencies makes a determination from undisclosed testimony seemingly contra to the government's instant claim that a controlling percentage of these fishermen were not employees but were independent businessmen or joint venturers with the dealers for whom they operated," as said by the Court of Appeals for the Fifth Circuit in our case, we believe it too well settled for further argument that this Court will not recognize and enforce one rule of law in a criminal case and a different rule in a civil case involving taxation where the government seeks to collect taxes because of the very acts and relationships it denounces in the criminal prosecution, especially so when the employment now being taxed is well recognized by the decided cases cited in the original petition filed herein.

Our case is now presented for rehearing on the basis of a conflict in the decisions between the other Circuits mentioned above and this court not heretofore known to exist, in addition to the grounds asserted in the original petition which we believe to be meritorious.

Since this court has often cautioned that its denial of a petition for certiorari is not to be construed as a decision on the merits, we urge the court to grant certiorari and permit a decision on the merits of the several contentions of petitioners which we believe to be meritorious.

Conclusion

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit be reheard and vacated and that the petition be granted.

Dated: January 16, 1957.

ALBERT S. JOHNSTON, JR.,
Counsel for Petitioners.

Certificate of Counsel

The undersigned, Albert Sidney Johnston, Jr., Attorney for petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58, of the Supreme Court of the United States, effective July 1, 1954, and that said petition for rehearing is not interposed for delay.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioners.

Proof of Service of Petition

STATE OF MISSISSIPPI,
Harrison County

Personally came and appeared before me, the undersigned authority in and for the aforesaid county and state, the within-named Albert Sidney Johnston, Jr., who after being by me first duly sworn on oath said that he is attorney for the petitioners in the above-entitled cause and as such authorized to make this Certificate, and that he served a copy of the above and foregoing petition for rehearing on J. Lee Rankin, Esq., Solicitor General of the United States by mailing a true and correct copy thereof to said J. Lee Rankin, Esq., postage prepaid to his office in Washington, D. C. on this the 17 day of January, A. D., 1957.

ALBERT SIDNEY JOHNSTON, JR.,
Affiant.

Sworn to and subscribed before me on this the 17th day of January, A. D., 1957.

JULES A. SCHWAN,
Notary Public.

(Seal)

My commission expires 11/22/58.

(3453-8)